United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

Affidavit of Service Inside

76-1462

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76 - 1462

UNITED STATES OF AMERICA,

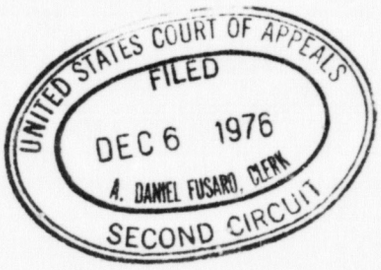
Plaintiff-Appellee

- against -

LAMONT FLOYD and PETER OLIVO,

Defendant-Appellants.

BRIEF FOR APPELLANT
LAMONT FLOYD



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Preliminary Statement

Lamont Floyd appeals from a judgment entered in the United States District Court for the Eastern District of New York (Pratt, J.) on October, 1976, convicting him of armed bank robbery in violation of Title 18, United States Code, Section 2113 (a) and (d).

The indictment in two counts charged Floyd with robbing the Chase Manhattan Bank on October 31, 1975, using a dangerous weapon.

After a jury trial the defendant was found guilty of both counts and the district court sentenced him to a term of imprisonment of fifteen (15) years.

Statement of Facts

A. Government's Case

On October 31, 1975, at approximately 10:25 a.m., the Chase Manhattan Bank at 1104 Rutland Road in Brooklyn, was robbed by three masked men. According to the bank's records, $8,591.00 was stolen (81-85). Photographs taken by a security camera located above the entrance to the bank showed three masked men, but since masks were worn throughout the robbery, no positive identification of the robbers was made by these photographs or by any other means. The government produced two eyewitnesses who similarly failed to make any positive identification. The bank guard, James Louis, testified that three men wearing masks entered the bank and that one carried a shotgun but due to the masks, he was unable to identify them (36). In his initial statement to the FBI, Louis said that two of the men had shotguns (58). The government also called the assistant manager of the bank, Raymond Brown, who testified that upon the commencement of the robbery, he fell to the floor and activated the alarm underneath his desk (82). He did not get up from underneath the desk until "I heard someone say 'it's over" (83). Therefore, Brown was underneath the desk for the entire period of the robbery and was obviously unable to make any identification whatsoever of the participants.

Because of the inability of the eyewitnesses to

make an identification the government's case against the defendants depended entirely on the testimony of Xavier King. King, previously convicted for several felonies, pleaded guilty to charges of bank robbery and was awaiting sentence at the time of this trial. He testified that he drove the defendants Floyd and Olivo as well as a third person, Edwin Almestica, both to and from the bank. He also claimed to have been present in an apartment at 843 Saratoga Avenue where the robbery was planned and where the money was later distributed. While King claimed that eight people were present in the apartment at that time, he was the only one who testified as to the occurrence of such a meeting.

According to the government, the robbery was planned in an apartment at 843 Saratoga Avenue some time during the early morning of October 31, 1975 and Floyd and Olivo, as well as Almestica and King were present at this meeting. Thereafter, these four individuals proceeded to load a shotgun and two hand guns and drove in a stolen car to a store where they purchased Halloween masks. Xavier King then drove all four from the store to the bank and parked the car around the corner from the bank.

The government then contended that while King remained in the car the three other participants entered the bank and, with expert skill and precision carried out

the robbery in less than a minute. They returned to the car where King was waiting.

Finally, the four alleged conspirators returned to the apartment at 843 Saratoga Avenue where the money was counted and distributed in the presence of four additional persons. None of these individuals were called by the government as witnesses.

B. Defendant Floyd's Case

Lamont Floyd testified that on October 30, 1975, the day before the robbery, he played handball until approximately 3:00-3:30 p.m. and returned home watching cartoons on television until 7-8 p.m. He then did pushups and rested for another two hours, after which he went to sleep (498). The next morning, Floyd's girlfriend, Suqulia Vantessa Manning, left school early and proceeded to Floyd's apartment at 497 Myrtle Avenue, where she arrived between 9:30 and 10:00 a.m. (400-402). Manning awakened Floyd and she remained with him until he asked her to prepare breakfast (494). After breakfast, Manning washed the dishes and Floyd returned to his room and did pushups. Floyd then rested and talked to Manning until she left at approximately 2-3 p.m. When Manning returned home she called Floyd and they spoke on the telephone for a few minutes.

These facts were all corroborated by Manning's testimony (402-411). Additionally, she testified that while

Floyd was in his room after breakfast, she, upon finishing the dishes, watched television.

Floyd knew Xavier King but had never been to the apartment at 843 Saratoga Avenue (504). He estimated that it was approximately a half hour ride from his own apartment at 497 Myrtle Avenue.

Finally Floyd testified that although he never finished high school, his inability to learn and particularly his difficulty with reading made it necessary for him to attend a special class designed for slow learners while he was in shcool.

Questions Presented

1. Whether it was proper to admit the hearsay testimony of a co-conspirator when the conspiracy had clearly ended and no acts in furtherance of the alleged conspiracy were being committed at the time the out of court statement was made?

2. Whether the failure of the court to give defendant's requested charge on accomplice testimony was prejudicial when the Government's case depended entirely on such testimony, the facts were closely balanced, and the accomplice witness admitted that he had a strong motive to lie?

3. Whether it was prejudicial error for the court to single out the defendant's testimony in the charge and state that the defendant had a motive to lie when the defendant's credibility was of the utmost importance and the facts were closely balanced?

4. Whether the government's summation on missing witnesses deprived the defendant Floyd of his right to rely upon the government's failure of proof?

5. Whether it was proper to admit testimony of a government witness when the government failed to provide notice of his testimony as required by Fed. R. Crim. Proc. 12.1 and when the remedy for failure to provide notice is exclusion of the testimony?

ARGUMENT

POINT I

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN ADMITTING HEARSAY STATEMENTS RESULTING IN UNDUE PREJUDICE TO DEFENDANT LAMONT FLOYD

During the testimony of James Duffin, the district court erroneously admitted hearsay statements resulting in clear prejudice to the defendant, Lamont Floyd. Duffin, who was presently incarcerated for a mugging (240) testified that on November 1, 1975, the day after the bank was robbed, he and Peter Olivo proceeded to Strauss and Riverdale Streets, the site of the car allegedly used to drive to and from the scene of the robbery. Olivo then poured gasoline over the car and he, together with Duffin, set fire to it (299). These events transpired at noon on Saturday and in the presence of at least one witness who saw the entire incident from the steps of a nearby house (317-320). Duffin testified that on the way to Strauss and Riverdale Streets, Olivo told him that he was about to burn the car that he and Lamont Floyd used to rob a bank the previous day (293).

Such a statement with respect to Floyd is unquestionably hearsay. According to Fed. R. Evid. 801 (c),

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted.

The statement at issue fits this definition exactly since it was made out of court and it was offered for its truth. Fed. R. Evid. 802 makes such hearsay inadmissible.

Contrary to the contention of the government, the statement does not fall within the narrow co-conspirator exception to the hearsay rule. Krulewitch v. United States, 336 U.S. 440 (1949). The statement was made long after any possible conspiracy had terminated. It also was not made while performing any acts in furtherance of the conspiracy. The co-conspirator exception has consistently been held to be a most narrow one:

> "We have consistently refused to broaden that very narrow exception to the traditional hearsay rule which admits statements of a codefendant made in furtherance of a conspiracy or joint undertaking." Wong Sun v. United States, 371 U.S. 471, 489 (1963). See Gruenewald v. United States, 353 U.S. 391, 404 (1956).

Because of the Supreme Court's repeatedly stated refusal to expand the scope of this narrow exception to the hearsay rule, the prerequisites for its application must be followed scrupulously.

> ...Hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged..."Krulewitch v. United States supra at

The conspiracy in the instant case, if one can be implied, had only one objective: the robbery of the Chase Manhattan

Bank on October 31, 1975. Peter Olivo's subsequent attempts to burn the car were completely unrelated to a conspiracy which had already accomplished its one and only objective.

The Supreme Court in similar cases has specifically refused to extend the co-conspirator exception to instances of concealment of evidence. In Krulewitch v. United States, supra, the Court rejected the government's argument that a conspiracy includes subsequent attempts to conceal facts or evidence pertaining to the crime.

> "We are not persuaded to adopt the government's implicit conspiracy theory which in all criminal conspiracy would create automatically a further breach of the general rule against the admission of hearsay evidence." Id. at 444. See Gruenewald v. United States, supra at 399.

This rule of law was further explained by the Court in Gruenewald v. United States, supra, where it was noted that:

> ...after the central purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment... Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time in which hearsay declarations will bind co-conspirators. Id. at 401-402.

The Gruenewald Court distinguished between what it termed the "main criminal objectives of the conspiracy and acts of concealment done after these central objectives have been attained

for the purpose only of covering up the crime." Id. at 405 The Court offered the example of kidnappers in hiding while waiting to receive a ransom and therefore committing acts of concealment in furtherance of the conspiracy. On the other hand, the same kidnappers, after abandoning the victim, who attempt to escape detection, cannot be acting in furtherance of the main objectives of the conspiracy. Instead, they are simply concealing evidence of a crime after the conspiracy has ended. Id.

In the case at bar, it is difficult even to infer any implied agreement to conceal evidence by means of burning a car. Possibly, one could infer an agreement to abandon the car, which was in fact done after the robbery and attainment of the sole objective of the conspiracy. It is certainly impossible to infer an agreement to set fire to the car at noon on Saturday in the middle of a street and in the presence of a witness, an act which would draw attention to the crime and would hardly conceal evidence of it. All that can be inferred is that Peter Olivo, on his own initiative, decided that he would burn this car which had previosuly been abandoned. Yet even if the burning of the car on the following day were viewed as connected in some way to the conspiracy, it, like the kidnappers attempting to escape detection after abandoning the victim supra, was not committed in furtherance of the conspiracy. Any conspiracy certainly ended with the robbery

and the distribution of the money. Had Olivo a month or a year later proceeded to burn the can in which he carried the gasoline, one would then have to include that act as part of the conspiracy, along with the burning of the car. As the Supreme Court noted in Krulewitch, Gruenewald, and all subsequent cases, the chain can thus be extended indefinitely and would make the hearsay rule completely meaningless.

It is therefore entirely consistent with the stated policy in this area of the law that the Supreme Court ruled such post-conspiracy hearsay inadmissible and reversed the convictions of defendants prejudiced by them. In the instant case, the prejudice arising from the admission of the hearsay far exceeded any probative value the statement had. Cf United States v. DeCicco, 435 F. 2d 478, 483 (CA2 1970). The fact that the jury took an unusually long period of time in its deliberations, advised the court twice that it was deadlocked, and reached a verdict only after receiving a modified Allen charge, illustrates the closeness of the evidence in this case. Aside from the testimony of Xavier King, this hearsay statement was the only evidence implicating Lamont Floyd. Therefore, its erroneous admission in a closely balanced case like this certainly had a prejudicial effect on Floy's case. The error was compounded by the subsequent refusal of the court to include even a curative charge. Lutwak v. United States, 349 U.S. 504. The only remaining alternative is reversal.

POINT II

THE FAILURE OF THE DISTRICT COURT TO GIVE DEFENDANT FLOYD'S REQUESTED CHARGE NO. 1 ON ACCOMPLICE TESTIMONY IS REVERSIBLE ERROR

The district court erroneously failed to give defendant Floyd's requested charge on accomplice testimony. Particularly here where the Government's entire case depends on the testimony of an accomplice, Xavier King, the jury should have been apprised of the potentially unreliable nature of accomplice testimony. United States v. Owens, 460 F. 2d 268, 269 (CAIO 1972). The defendant's requested charge was identical to that approved by the United States Court of Appeals for the Third Circuit in United States v. Murray, 445 F. 2d 1171, 1176 (CA3 1971).

King's testimony was not only inherently suspicious because of his role as an accomplice. King admitted on cross-examination that he was willing to lie to save himself (285). A similar instance where a witness "indicated less concern with the truth than with his own skin" arose in Tillery v. United States, 411 F. 2d 644, 648 (CA5 1969). There too, the accomplice's testimony comprised the entirety of the government's case. The court there considered the failure to give a charge on accomplice testimony to be plain error even though defendant's counsel failed to object. In the instant case, there was an objection to the failure to give the requested charge. In this case, as in Tillery, the decision should be reversed.

At the time of the trial, the accomplice witness,

King, had already pleaded guilty to charges of bank robbery and was awaiting sentence. The Government promised him that the sentencing judge would be notified of his testimony against Lamont Floyd (233). Under these circumstances, and given the fact that King's testimony provided the only evidence implicating Floyd, United States v. Davis, 439 F. 2d 1105 (CA9 1971), the failure to give the requested charge in such a closely balanced case must have been highly prejudicial to Floyd. Such a prejudicial error requires reversal.

POINT III

THE COURT'S SINGLING OUT FLOYD'S TESTIMONY AND THE STATEMENT IN THE CHARGE THAT FLOYD HAD A MOTIVE TO LIE, CREATED EXTREME PREJUDICE AND REQUIRES REVERSAL.

The court in its charge to the jury singled out the defendant's testimony and specifically noted that: "You may consider that a defendant has a strong motive to life to protect himself..." (892).

The closeness of the facts in this case resulted in jury deadlock and finally compelled the use of a modified Allen charge to obtain a verdict. The only issue was whether the jury believed Floyd's story or that of Xavier King, his confessed accomplice. In such a case, where the credibility of the defendant was of the highest importance, a statement by the court that the "defendant has a strong motive to lie to protect himself" is unquestionably prejudicial.

In defendant's Request for Charge No. 2 the defendant objected to any instruction referring specifically to a defendant's testimony. It has been held to be preferable not to single out the defendant's testimony which should be considered by the jury in the same manner as any other testimony. United States v. Reid, 410 F. 2d 1223 (CA7 1969). Such a focussing on the defendant's testimony is particularly poor policy in a case like this one, turning upon the defendant's credibility.

The court nevertheless insisted upon commenting

on the fact that defendant took the stand. While defendant's alternative Request No. 2 was followed in part, the court went on to the highly prejudicial comment concerning defendant's motive to lie. This statement in particular, and generally the giving of any instruction concerning the defendant's testimony in a case like this one are cause for reversal.

POINT IV

THE PROSECUTOR'S SUMMATION DEPRIVED THE DEFENDANT FLOYD OF HIS RIGHT NOT TO OFFER ANY EVIDENCE

Appellant Lamont Floyd respectfully refers the Court to Point I of co-appellant Olivo's brief.

POINT V

THE DECISION BELOW SHOULD BE REVERSED BECAUSE OF THE COURT'S IMPROPER ADMISSION OF TESTIMONY BY GOVERNMENT WITNESS IN DIRECT VIOLATION OF FED. R. CRIM. PROC. 12.1.

The district court wrongly allowed the testimony of James Duffin, whose name was not provided to the defendants in advance of trial as required by Fed. R. Crim. Proc. 12.1. Indeed the only government witness of whom the defense was informed prior to his testimony was Xavier King. According to Rule 12.1(b):

> Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

Rule 12.1(c) provides that this duty of the government to notify extends to any new witnesses whose identities become unknown through the conclusion of the trial. The government failed to comply with these requirements although the defense, in its Notice of Alibi dated June 10, 1976 did provide notice of their alibi witnesses to the government.

Under Rule 12.1 (d) the remedy for failure to comply with the requirements of Rule 12.1 is the exclusion of the "testimony of any undisclosed witness offered by such party as

to the defendant's absence from or presence at, the scene of the alleged offense." While the court may grant exceptions "for good cause shown," Rule 12.1(e), the government never showed cause for its failure to comply with the rules. The court therefore should have followed Rule 12.1(d) and excluded the testimony of Duffin. The failure to do this was reversible error.

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted

PAUL E. WARBURGH, JR.,
Attorney for Appellant Floyd

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF } SS.:

FLORISTEANE ANTHONY

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at

That on the 6th day of DECEMBER 19 76

deponent served the within APPELLANT'S BRIEF & APPENDIX

upon JONATHAN M. MARKS
ASS'T U.S. ATTORNEY

attorney(s) for U.S.

in this action, at 225 CADMAN PLAZA E BROOKLYN, N.Y. 11201

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within New York State.

Floristeane Anthony

Sworn to before me,
this 6th day of December 19 76

Ruth C. Kelly